# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 27, 2005 |
| v | No. 254008<br>Wayne Circuit Court |
| WILLIE MONROE,<br><br>Defendant-Appellant. | LC No. 03-012337 |

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carjacking, MCL 750.529a, receiving stolen property, MCL 750.535(7), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

This case arises out of an incident in which defendant is alleged to have stolen a car from the complainant at gunpoint. At trial, the complainant testified that while seated in a rental vehicle outside a Detroit gas station she saw someone reach for the driver door handle of the vehicle. The complainant turned to see a man standing by the driver's window, armed with a handgun and telling her to get out of the car. She described the man as approximately five feet seven inches to five feet nine inches in height, skinny, approximately one-hundred-sixty pounds, and brown skinned. After leaving the vehicle the complainant saw the man drive away in the car.

Approximately one week later, defendant was found by police kneeling by the front driver's side tire of the vehicle. Defendant was taken into custody. According to the arresting officer, defendant was six feet one inch in height and weighed two hundred pounds at the time of his arrest. The following day, the complainant was shown a photographic array consisting of six photographs, including one of defendant. After approximately three minutes, the complainant identified defendant as "look[ing]" like the man who stole her car at gunpoint. During the preliminary examination and again at trial, the complainant again identified defendant as her assailant.

On appeal, defendant first argues that he was denied due process because a witness' statement containing exculpatory information was not presented at his trial. Specifically, defendant argues that "if" the prosecutor did not produce the subject statement prior to trial, the prosecution was in violation of the disclosure requirements of *Brady v Maryland*, 373 US 83; 83

S Ct 1194; 10 L Ed 2d 215 (1963). However, defendant has failed to provide any factual support for his allegation that the prosecution suppressed favorable evidence, see *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998), and his mere conjecture as to the prosecution's suppression of the statement is insufficient to establish a *Brady* violation. See *People v Brownridge*, 237 Mich App 210, 214-215; 602 NW2d 584 (1999).

For this same reason, we reject defendant's assertion that "if" defense counsel possessed this statement before trial but failed to present it to the court, defendant was denied his right to the effective assistance of counsel. Defendant's assertion in this regard is one of several alleged errors on the part of trial counsel that defendant argues establishes that the assistance of his trial counsel was ineffective. A defendant seeking to establish ineffective assistance of counsel must overcome a strong presumption that his counsel's performance constituted sound trial strategy, *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), and must show that his counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the results of the proceedings would have been different, *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Because this Court denied defendant's motion to remand for a *Ginther*[1] hearing, our review of defendant's claim that he was denied the effective assistance of counsel is limited to mistakes apparent on the record. *Id*. at 423.

Applying the foregoing principles, we find defendant's assertion that counsel ineffectively handled the alleged exculpatory statement to be baseless. Indeed, defendant has failed to provide any factual support for his contention that his defense counsel had possession of the statement, and his mere speculation regarding defense counsel's possession of the statement is insufficient to overcome the strong presumption that his counsel provided effective assistance at trial. *Riley*, *supra*.

We similarly reject as baseless defendant's claim that his counsel was ineffective for failing to timely file a notice of alibi. Contrary to defendant's assertion, the record reveals that the notice of alibi was filed with the court and served on the prosecuting attorney within ten days before trial in this matter commenced. Consequently, the notice of alibi was timely under MCL 768.20(1). See *People v Bennett*, 116 Mich App 700, 703-707; 323 NW2d 520 (1982).

Defendant also argues that he was denied his right to the effective assistance of counsel because his trial counsel failed to present an alibi defense. However, the record indicates that on the first day of trial defense counsel informed the court that pursuant to discussions with defendant, the defense was withdrawing presentation of its sole alibi witness. Although present at the time of these statements, defendant did not interject to dispute his attorney's statements to the court. Nor did he object to his counsel's waiver of an alibi defense at any other point during trial, or at sentencing. Because the record indicates that defendant acquiesced in the decision not to present an alibi defense, he may not now predicate a claim of error on that decision. Indeed,

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"[t]o hold otherwise would allow defendant to harbor error as an appellate parachute." *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).[2]

Defendant next argues that he was denied his right to the effective assistance of counsel because his defense counsel failed to challenge the use of a photographic array in place of a corporeal lineup. In *People v Currelley*, 99 Mich App 561, 564; 297 NW2d 924 (1980), this Court acknowledged the general rule in Michigan that a photographic array should not be used in place of corporeal lineup when the defendant is in custody, but that this general rule is subject to certain exceptions. *Id*. Defendant argues that no such exceptional circumstances existed in this case and that, therefore, a corporeal lineup was required. We do not agree. One of the exceptions recognized by the *Currelley* Court as justifying the use of a photographic array rather than a corporeal lineup are those instances where it is not possible to arrange a proper lineup because there are insufficient persons available with physical characteristics similar to those of the defendant. *Id*. at 564 n 1. Here, the police officer who set up the array testified that a photographic array, rather than a lineup, was used because there were not enough prisoners in custody of similar description to defendant. Because the use of a photographic array in place of a corporeal lineup was justified, counsel was not ineffective for failing to challenge use of the array. See *People v Walker*, 265 Mich App 530, 546; 697 NW2d 159 (2005) ("Counsel is not ineffective for failing to advocate a futile or meritless position").

Finally, defendant argues that the complainant's in-court identification of defendant denied him due process because it was fatally tainted by the suggestive nature of the confrontation at the preliminary examination. Again, we disagree. Due process is denied when identification procedures are unnecessarily suggestive and conducive to irreparable misidentification. See *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Thus, an identification procedure will be found to be impermissibly suggestive when it can give rise to a substantial likelihood of misidentification. *Simmons v United States*, 390 US 377, 386; 88 S Ct 967; 19 L Ed 2d 1247 (1968). The danger is that an initial improper identification procedure may result in misidentification and will unduly influence any later identification. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). As defendant points out, our Supreme Court has held that confrontation between a witness and the defendant at a preliminary hearing can constitute a suggestive identification procedure. See *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973) (Lesinksi, C.J., dissenting), adopted 391 Mich 767; 214 NW2d 60 (1974). However, this Court has held that *Solomon*, *supra*, was a narrow holding and does not establish that all confrontations at preliminary examinations are impermissibly suggestive. See *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975) (explaining that whether a

[2] Moreover, to the extent that defendant implies that it was incumbent upon the trial court to inquire of defendant whether he in fact acquiesced in counsel's decision to forgo an alibi defense, we note that there is no case law to support that a defendant must personally state his agreement to waiver of an alibi witness on the record. Cf. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985) (finding that there is no requirement that a defendant's waiver of his right to testify be asserted on the record); see also *People v Stevenson*, 60 Mich App 614, 618-619; 231 NW2d 476 (1975) (the decision whether to call an alibi witness is a matter of trial strategy left to the discretion of trial counsel).

confrontation is impermissibly suggestive depends on the totality of circumstances in the particular case); see also *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

Here, there is an insufficient basis to conclude that the identification of defendant during the preliminary examination was impermissibly suggestive. *Kachar*, *supra*. There is no allegation of any police suggestion. Moreover, the length of time between the carjacking and the preliminary examination was twenty-one days, and the in-court identification occurred just under three months after that. Furthermore, the proceedings took place in the courtroom, and the complainant observed defendant during the carjacking and identified him from the photographic array. Given these circumstances, we find no due process violation attendant the in-court identification.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder